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# Beyond Bed and Bread: Making the African State through Marriage Law Reform – Constitutive and Transformative Influences of Anglo-American Legal Thought

SYLVIA WAIRIMU KANG'ARA\*

## Introduction

In most African countries formerly under British rule, marriage defined the colonial state in two important respects. Between 1850 and 1930, declarations by colonial courts that African customary marriages were invalid because they were not conceptually identical to English marriages opened the way for colonial governments to assume and exercise territorial authority. Proponents of colonialism assumed that African and English land tenure concepts were similarly irreconcilable, which justified expropriation and displacement. Between 1930 and 1960, important changes in international law and local resistance to colonialism influenced colonial law to recognize customary marriages as valid and customary land tenure as worthy of protection. Despite this shift, colonial governments, however, maintained that the English form of marriage was superior and offered incentives for conversion of customary marriages. The formal recognition of both forms of marriage therefore only ushered in an era of competitive and disharmonious coexistence, creating systemic problems and great need for state-directed marriage law reform.

Part II of this article argues that colonial era adjudication of

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\* Assistant Professor of Law, University of Washington School of Law. I would like to thank Duncan Kennedy, Janet Halley, and Fernanda Nicola, for inviting me to present earlier versions of this paper at Harvard Law School and at the Washington College of Law in 2009 and 2010 respectively. I thank them for comments on earlier drafts and for their wonderful support over the years. I am also grateful to Joel Ngugi and Deborah Maranville for their helpful comments on earlier drafts. Errors are all mine.

marriage validity forms was an important exercise of colonial authority not only because formal distinctions of marriage forms that resulted entrenched colonial territorial authority, but also because determinations of validity/invalidity triggered bureaucratization of society as the colonial state created administrative and enforcement institutions in response. The moral, economic, and political costs of colonial governance hinged on timely institutional evolution and reformulation of marriage law.

Whether the African form of marriage, which had come to bear the tag "African customary marriage" to contrast it with "English statutory marriage," was suitable to postcolonial society is a question that drew extensive academic attention between 1950 and 1965, the years of decolonization. Was the customary organization of family compatible with economic modernization and market capitalism, which most independence governments were poised to accept as national policy? Part III argues that former British colonies retained customary marriage because it would have been impossible to execute a capitalist national economic policy if the idea of the customary family was dismantled. Its retention in states that placed high premium on private property, individual free will, and formal liberal constitutionalism is otherwise unintelligible. In line with the reformist spirit of the moment, though retained, customary law underwent doctrinal improvement in order to align the family with the new economic outlook of the state.

Part IV argues that the postcolonial doctrinal development of customary marriage law discussed in Part III has had the effect of opening up Western-derived law to influence by customary law, and vice versa. This has diminished the normative hierarchical polarization of the two regimes discussed in Part II. Courts have infused Western legal concepts with customary norms in order to avoid unjust outcomes, and vice versa. Traditional theories of legal pluralism never imagined regime fusion of this sort because they assumed that customary law's inferior status would lead sophisticated social actors to choose Western-derived law, a choice that courts would honor. Courts have rightly been outcome sensitive as they are aware that regime purity does not guarantee just outcomes in many cases: peoples "affairs" in societies undergoing intense transformation tend to be a patchwork of relationships formed around competing legal regimes, often less because of individual choice and more because of social complexity and institutional constraints. Western/customary internal diffusion of legal norms helps resolve the fundamental contradiction of postcolonial economic modernization, namely, that formal rights

have tended to strengthen the hands of oppressive regimes and to skew wealth distribution. As much as the proliferation of formal rights has been a global trend, such diffusion has become a counter trend, which leads us to conclude that legal pluralism is indispensable to national and transnational governance, and the family and state are mutually constitutive.

This paper is critical of the tag "African" but uses it to demonstrate its historical uses and capacity to adapt to a range of state projects. It is used to perpetuate the African/Western conceptual binary in the early colonial period, for instance, in statutory, judicial, and academic references to African customary law as a source of colonial law. In the postcolonial era, it is used in statutes such as the African Christian Marriage and Divorce Act, a Kenyan statute governing Christian marriages between African individuals. In this sense it signals the subjects of a given statute rather than customary or traditional practices. The tag has also had rhetorical effect against Western domination and in favor of nationalist programs. Despite these varied usages, we should not assume that there exists a homogenous African people, customary law, or identity.

Similarly, the category Anglo-American legal thought has developed from long historical usage. I use it here to signal to the reader that this work is limited in scope. It describes the evolution of marriage law only in common law African countries, that is, countries formerly under British colonial rule. While the influence of English statutes, common law, and doctrines of equity, judicial institutions and judicial practices is strong, so is that of Anglo-American legal thought, a way of reasoning about law, adjudicating disputes, and justifying legal outcomes by appealing simultaneously to a body of positive laws and social ends.

### **I. Marriage and Conquest: Classical Legal Thought in Colonial Family Law**

The early colonial period began in the second half of the nineteenth century and lasted until about 1930. Its primary focus was the founding of the colonial state. Critical to this mission was land expropriation for white settlement. By asserting exclusive authority to define marriage, the colonial state disrupted African social systems and their hold on land making expropriation for this purpose possible. Courts relied on classical legal thought to cast European and African conceptions of family as irreconcilable and to postulate that moral individualism was the normative foundation of

colonial law. They held that for this reason, marriages under African customary law were invalid. English legal sense and morality varied unpredictably; the decision to supplant African customary laws was discretionary and case-by-case. While ostensibly legally bound, colonial courts and administrative agents actually had almost free reign to establish the content of African customary laws. They read English law and morality as if static, deferred to and selected from customary law in completely unpredictable ways.<sup>1</sup>

The significance of judicial use of techniques of classical legal thought to comparative and international law is that it was an act of reliance on the idea that the west and western institutions were morally and legally superior to those of non-western society to facilitate the diffusion of the conceptual templates, reasoning techniques, and normative commitments of the former. To proponents of this claim, no institution more starkly distinguished the two societies than the family, and none more seriously threatened the advance of market capitalism. In this sense then, the family has been and remains at the center of global governance concerns. Even though classical legal thought opposed state regulation of the family in the West, categorizing it as a private institution, it failed to do so in the colonies where instead, it considered the Nonwestern family pre-modern and therefore not within the protective cover of "the private."<sup>2</sup>

In the late colonial period, however, which lasted between 1930 and 1950, colonial governance policy, influenced by a shift in Anglo-American legal thought toward a social view of law that recalibrated the core assumptions of public international law and comparative social science, shifted from opposition to acceptance of an obligation to sustain customary institutions. Unlike classical legal thought, the social view of law favored political and economic self-determination of colonized peoples. It accepted the findings of ethnographers and other social scientists that non-Western peoples had sophisticated institutions of self-governance, which invalidated the premises of colonial domination. It rejected the distinction between law and custom and advocated for legal pluralism as part of a conception of law in action.

In any case, the colonial government wanted to ease the costs of governing vast swaths of remote territory directly without

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1. Arthur Phillips, *The Future of Customary Law in Africa*, in SYMPOSIUM 88, 90 (Afrika Instituut Leiden, 1956); Max Rheinstein, *Law and Social Changes in Africa*, 1962 WASH. U. L. Q. 443, 447 (1962).

2. Maria Rosaria Marella, *Critical Family Law*, 19 AM. U. J. GENDER SOC. POL'Y & L. 721 (2011) (drafted utilized and is on file with the author).

relinquishing control by granting local communities total autonomy. It created native courts whose judges it appointed and whose jurisdiction it regulated. Customary law thus became positivized and bureaucratized. Systemic incoherence, as evidenced by wildly inconsistent judicial findings on the validity of customary marriages, and social injustice, as evidenced by continuing impoverishment of African populations, soon followed, eventually leading to the demise of colonialism and ushering in an era of socio-legal reform and doctrinal development customary family law, discussed in Part III.

### A. Classical Legal Techniques in Early Colonial Courts

British governance of colonized territory typically began with reception statutes that stipulated sources of law and their internal hierarchy.<sup>3</sup> They recognized African customary law but with a proviso that voided it in favor of positive English law upon judicial determination that it offended justice and morality or contravened written law. This statutory mandate gave colonial courts broad interpretive discretion, which they wielded in the early years to produce a schematic colonial family law that bolstered colonial domination. Courts carried out this commission with the tools of classical legal thought, which required them to apply law to facts with scientific exactitude. They did not merely decide cases, they drew conclusions about the validity of customary law relationships from a system of rules whose integrity and coherence it was their duty to protect. Beyond finding that customary marriages were invalid because they permitted polygamy and dowry and were therefore repugnant to English justice and morality, the body of case law they produced created a highly refined conceptual scheme that enumerated the distinctive elements of African and European marriages. They then extrapolated that present in the later and missing in the former was the principle of moral individualism, which it was their mandate to promote. They presented the European marriage-type as formal, legalistic, demanding, exclusive, and constraining, and therefore valid; and the African marriage-type, as informal, customary, not strictly legal, nonbinding, and non-exclusive, and therefore invalid.<sup>4</sup>

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3. T. OLAWALE ELIAS, *BRITISH COLONIAL LAW* (1962).

4. "The 'lobola' marriage of the African is the typical form of matrimony of the indigenous tribes of Africa south of the Sahara. . . . Known in modern South African law as 'native customary union,' the lobola marriage does not, strictly speaking, qualify for inclusion among South Africa's systems of matrimony. Being potentially polygamous, it is not recognized as a legal marriage." H. R. Hahlo, *The Matrimonial Régimes of South Africa*, in *FAMILY LAW IN ASIA AND AFRICA*: 143, 146 (J. N. D. Anderson ed., 1968); "In the

A characteristic of early colonial family law pointing to the influence of classical legal thought is the fact that its unit of analysis was the individual, the holder of abstract rights derived exclusively from a positive law administered and enforced by a learned state bureaucracy.<sup>5</sup> The formal definition of marriage under English law had essential classical elements such as individualism, free will, and exclusivity, a checklist by which colonial courts found African customary law marriages not valid. Consider *Hyde v. Hyde*, the 1866 English case that defined marriage as the “voluntary union for life of one man and one woman to the exclusion of all others,” represents the general tenor of the colonial attitude toward African customary marriages.<sup>6</sup>

The elements of African customary law marriage that colonial courts, applying the rule in *Hyde*, found repugnant to justice and morality included polygamy and the giving of “bride price” by the groom’s family to the bride’s family.<sup>7</sup> Polygamy violated the exclusivity requirement of English law and morality. The payment of “bride price” not only violated English colonial morality – colonialists understood it to be wife purchase – it caused marriage to be about the community rather than about the individual exclusively. Marriage under *Hyde* was a private agreement. Marriage under African customary law was a public affair involving the giving of material things by one family to the other. Community

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colonial period it was widely contended that marriage did not exist in Africa at all. Prejudices received indirect reflection in legislation: local marriage was defined as a ‘customary union.’ This presupposed a simple association.” Irina Sinitsina, *African Legal Tradition: J. M. Sarbah, J. B. Danquah, N. A. Ollennu*, 31 J. AFR. L. 44 (1987); See also Eugene Cotran, *The Changing Nature of African Marriage*, in FAMILY LAW IN ASIA AND AFRICA 15, 16 (J. N. D. Anderson ed., 1968) (citing numerous examples of colonial denigration of customary marriage).

5. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 25-27 (David M. Trubek & Alvaro Santos eds., 2006) (discusses the will theory and individualism as important characteristics of classical legal thought).

6. Cotran, *supra* note 4, at 15 (discussing *Hyde v. Hyde*, [1866] L.R. 1 P. & D. 130 (Eng.) definition of “marriage”).

7. Out of the understanding that the transfer of wealth from the groom’s family to that of the bride’s is an important element of an African customary law marriage that, though involving property, does not constitute a commercial transaction but is rich with cultural meaning. “Bride price” is a highly contested term used today in rhetorical reference to usage prevalent in a bygone era of African/Western conceptual conflict. Today the terms in use are bridewealth and dowry. See FAREDA BANDA, WOMEN, LAW AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE 108-111 (2005) (discussing *Rex v. Amkeyo*, (1917) 7 E.A.L.R. 14 (Kenya) that is often used as an example of judicial hostility towards African customary marriage). EUGENE COTRAN, CASEBOOK ON KENYA CUSTOMARY LAW 30-31 (1987).

involvement was an affront to the private and individual nature of marriage because it negated free will and the exercise of free choice by individuals. Besides, the exchange of things in marriage was not only pre-modern and primitive, it imputed a value to tangible goods incomprehensible in market terms and could not be allowed to prevail. Further, in place of tribal certification of marriage, the state should have been the proper certification authority to protect individuals from community control and domination as well as facilitate observance of individual morality by keeping a public marriage registry.

In denying legal validity to customary law marriages, colonial courts followed "careful" deductive application of law, aiming to make colonial laws coherent and predictable. Two cases exemplify this practice. The first, *Rex v. Amkeyo*<sup>8</sup> was a Kenyan case decided in 1917. It dealt with the question whether a woman married under African customary law was a "wife" for the purpose of common law spousal privilege in the law of evidence. The judge decided that, because the African practice of "wife purchase" was repugnant to justice and morality, it could not produce the privileged legal status of "wife." The woman could therefore be compelled to testify against her husband.

Spousal privilege under the law of evidence protected intimate domestic communication between husband and wife from exposure in the very public forum of criminal trial. Since English classical legal thought consistently rejected the idea that Africans had the concept of an intimate private domestic sphere, the privilege could not be extended to parties married under African customary law. Further, English legal positivists assumed that the African social order could not comprehend adultery as a concept because it embraced polygamy. In the same vein, whereas land acquisition and family morality were private matters in the classical legal scheme, African communities were considered not to have evolved a "private" sphere that the state was obligated to honor and protect. Holding land communally and marrying nonexclusively, English legal positivists saw Africans as lacking the private individual holder of exclusive and absolute rights.

In *Bishan Singh*,<sup>9</sup> the second exemplary case, a 1923 Uganda case in which two Christian Africans had purported to marry under

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8. *Rex v. Amkeyo*, (1917) 7 E.A.L.R. 14 (Kenya); See BANDA, *supra* note 7; ELIAS, *supra* note 3, at 111 (1962); Cf. E. Veitch, *Some Examples of Judicial Law Making in African Legal Systems*, 34 MOD. L. REV. 42, 48 (1971)

9. H. F. Morris, *Marriage Law in Uganda: Sixty Years of Attempted Reform*, in FAMILY LAW IN ASIA AND AFRICA 34, 39 (J. N. D. Anderson ed., 1968).



customary law, the appeals court ruled that because they were Christians, their "marriage" was invalid and therefore the husband could not maintain an adultery proceeding against a Sikh who had taken his "wife" away from him and was living with her. There could be no adultery conviction if there had been no "marriage" in the first place.

*Singh* was different from *Amkeyo*, one could argue, because the complainant had "chosen" Christianity but practiced paganism. The court had to determine which of the "conflicting" choices to honor. In *Amkeyo*, the court faced no such conflicting choices; rather, it set out to establish the legal basis for the validity of marriages under colonial law. But both cases aimed to make the law predictable and coherent. *Amkeyo* insisted that the definition of marriage and wife needed consistent and systemic determination. In *Singh*, the positive law schema which direct rule had established would have spun on its head were people allowed to choose Christianity but practice "pagan" marriage.<sup>10</sup>

Perhaps Africans marrying under customary law should not have expected privileges due to those married under statutory law, but one must note that in spite of efforts by classical jurists to separate the spheres, a completely autonomous sphere of customary law unaffected by statutory law had ceased to exist. It was therefore not up to individual Africans to choose the right marriage system or suffer the consequences. The "consequences" they would face after *Amkeyo* and *Singh* endorsed non-recognition doctrine, which ran far

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10. Justice Guthrie Smith observed:

The magistrate convicted the Sikh because the woman left her husband's house and went to live with him. Such an application of the rigours of the Penal Code to the protection of a mere casual and temporary liaison strikes one as startling and contrary to British ideas of morality. . . . marriages valid from the British point of view can only be effected under the Ordinance of 1902 except that native Christians may if they please marry under the Ordinance of 1903. The Ordinances are silent as to marriage of pagans; hence if two pagans marry by native custom they will have all the rights which flow from such a marriage under native law. The Ordinances are, however, imperative as to native Christians and so a marriage between Christians celebrated according to native custom is a nullity and no rights can be acquired thereby. Applying this to the present cast the marriage between the complainant and the woman was invalid and so no offence was committed by the Sikh in taking her away from him. Another argument leading to the same conclusion is that when people cease to be pagans and profess a religion which teaches monogamy and the sanctity of marriage, they must be taken to have abandoned the right to contract non-permanent unions such as are recognized and permitted under pagan customs.

Morris, *supra* note 9.

beyond the customary sphere. The interpenetration of the positive and the customary, of the informal and the formal, of the traditional and the modern, of the economic and the moral, made it impossible to be in one without being in the other. Before a statutory change in South African law, for instance, a woman married customarily was ineligible for workmen's compensation benefits upon the death of her husband in the course of employment.<sup>11</sup> Customary marriages could not form the basis of formal employment claims. Non-recognition promoted certainty in the formal employment market, by shielding employers, bureaucrats, and courts from the task of understanding the customary universe, but certainty in the formal economy unsettled informal economies by interfering with the allocation of resources within the family when a spouse had crossed over into the formal economy.

At the beginning of colonialism, some regimes, South Africa for example, held that marriage was for whites only.<sup>12</sup> Later, South Africa, like many other countries, shifted toward a policy of "voluntary" assimilation and permitted those Africans who — by virtue of education and religious conversion had become civilized and attained new political status — to marry under the statutory law that applied to Europeans.<sup>13</sup> Statutory marriages had full legal effect whoever the parties were and disputes went to regular courts for determination. Thus *Cole v. Cole*, a Nigerian case decided in 1898, held that a marriage under a colonial marriage ordinance stripped an African of African identity and clothed him "with a status unknown in African law."<sup>14</sup>

The choice to assimilate gave Africans equal status with Europeans in family law even if it did not give them substantive political and economic equality in the whole.<sup>15</sup> For an African to exercise this choice and enjoy this limited equality at this time in history, he or she had to have a certain level of affinity with and access to the colonial establishment. Economic opportunity accompanied assimilation.<sup>16</sup> Thus, the making of the African professional and business elite was from very early on bound up

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11. Hahlo, *supra* note 4, at 147–48.

12. Neville Rubin, *Customary Family Law in Southern Africa: Its Place and Scope*, in *FAMILY LAW IN ASIA AND AFRICA* 255, 258 (J. N. D. Anderson ed., 1968).

13. *Id.*

14. *Cole v. Cole*, [1898] 1 NLR 15 (Nigeria).

15. For an analysis of political and economic inequality of Africans vis à vis Europeans during the colonial era, see Y.P. GHAI & J. P. W. B. MCAUSLAN, *PUBLIC LAW AND POLITICAL CHANGE IN KENYA: A STUDY OF THE LEGAL FRAMEWORK OF GOVERNMENT FROM COLONIAL TIMES TO THE PRESENT* (1970).

16. *Id.*

with positive construction of the family.

Far from guaranteeing that the colonial state would respect pre-existing rights, the listing of customary law as a source of colonial law in reception statutes set in motion colonial expropriation of African land. Following classical legal techniques of conceptual differentiation and guided by moral individualism, colonial law was keen to separate land from family, morality from economy, and individual from group. Courts did this by casting customary marriages as questions of morality, and declared them invalid on that score. Conversely, casting land as a question of economy, they recognized customary land tenure as valid, characterized it as communal as opposed to private, then decided that it was legally inferior to European title under the doctrine of acquisition of land by conquest and under utilitarian theory of market efficiency, and therefore abrogable. To recognize African land tenure but label it communal was to give colonialists *carte blanche* to acquire African land. They argued, very simply, that communal land tenure was inferior, inefficient, and incapable of conferring property rights and could therefore not prevent colonial expropriation.<sup>17</sup> Only a system on an equal jurisprudential footing with the conqueror's could provide that protection; and the African system lacked the necessary stature. This technique of inclusive subordination was a staple of classical legal thought.<sup>18</sup> The colonialists didn't steal African land; rather, they respected African land tenure systems by recognizing them. By the mere application of rational logic, they then determined that expropriating African land did not offend law.<sup>19</sup> In this way, colonial lawmakers separated customary law from its social context by denying an important aspect of it: that family was an important locus of African normativity from which marriage and land tenure derived their validity. To hold that there could be a customary law under reception statutes but that customary marriages were repugnant to justice and morality while land tenure was not reified both customary law and Western justice and morality.

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17. H. W. O. OKOTH-OGENDO, *TENANTS OF THE CROWN: THE EVOLUTION OF AGRARIAN LAW AND INSTITUTIONS IN KENYA* (1991); James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 *BUFF. L. REV.* 1013 (2007).

18. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205 (1979).

19. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005). For a discussion of similar uses of positive law to override customary tenure, see E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (Pantheon Books 1975); WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (Hill & Wang 1983).

The different treatment land and marriage received exemplified classical legal thought's tendency to split and reify social spheres.<sup>20</sup> The pairing of land with economy and of family with morality in the early colonial context was consistent with the prevailing orthodoxy of Anglo-American classical legal thought, in particular the tendency to treat the private and public as separate and unrelated spheres.<sup>21</sup> It could tolerate hierarchy, altruism, and community in the Western family, considered private, but not in the African family, seen as pre-modern and a threat to the ideals the clear demarcation of private and public represented. Except for this splitting techniques, the unity of family and land as simultaneously moral and economic was not alien to Western legal thought.<sup>22</sup> However, accepting this would have undermined the conceptual foundations of colonialism by blurring the line between Western and African understandings of family.

Although aimed at ensuring order and market certainty, the subordination of African customary law to English law and morality produced vast uncertainty and conflict. To produce cognizable rights, customary land tenure needed to have created private individual property rights, and to yield cognizable marriages, African relationships needed to be individualistic and exclusive. The colonial state became constitutive of both land and family: land existed to advance a market society and family to universalize moral individualism. Unstated in this arrangement is that recognition of land tenure paved the way for land expropriation and non-recognition of African marriages weakened the African social order, and the two forces, of land tenure recognition and marriage non-recognition, worked in tandem to enhance colonial domination. Since individualistic morality was a precondition for economic opportunity, defining marriage was an important act of conquest and a cornerstone of the colonial market-oriented state.

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20. Kennedy, *supra* note 18 (discusses reification as a classical legal technique).

21. Kennedy, *supra* note 5, at 35; AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993).

22. A. N. Allott, *Family Property in West Africa: Its Juristic Basis, Control and Enjoyment*, in FAMILY LAW IN ASIA AND AFRICA 121 (J. N. D. Anderson ed., 1968); Kwamena Bentsi-Enchill, *Do African Systems of Land Tenure Require a Special Terminology?*, 9 J. AFR. L. 114 (1965); See also Marella, *supra* note 2.

## B. Glimpses of the Social View of Law in the Late Colonial Period: Legal Dualism and the Problem of Marriage Conversion

The end of the early colonial period happened when the colonial government began to rely on native institutions to govern vast swaths of remote territory including the reserves created for occupation by Africans it had displaced to settle Europeans. The doctrine of legal dualism, forged by Lord Lugard, a colonial governor in Nigeria, and broadly accepted by governors across the continent, held that native institutions were efficient tools of colonial governance.<sup>23</sup> Under it, chiefs had considerable administrative authority over African-settled areas, and courts began the process of positivization and bureaucratization of customary law. Disputes involving non-Africans were handled by regular colonial courts applying English law, and unlike native courts, were considered modern and prestigious.<sup>24</sup>

At this time, proponents of the social view of law were effectively undermining classical legal thought. They denied the illegitimacy of group rights and social welfare and saw legal

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23. To get an idea of the shift in attitude that characterized this period, see Morris, *supra* note 9, at 38:

[D]uring the decade immediately following the enactment of these Ordinances there was little criticism of the law as it stood. Those were days when administrators, as well as missionaries, believed that the inherent virtues of Christianity and Western civilization would soon lead to the replacement of indigenous customs such as polygamy. The outlook of the administrator of the inter-war period, however, tended to be very different. Unlike his pre-war counterpart, he was not likely to be a regular churchgoer, and frequently had little sympathy with either the missionaries or their activities. . . . The pre-British, or rather pre-missionary, period tended to be idealized by many of these officers who . . . often built up for themselves a somewhat synthetic and romanticized version of what the way of life in the old society had been. Institutions such as bridewealth, and the mystical symbolism believed to be associated with it, appeared to many European administrators to be more attractive than the often rather forbidding and puritanical tenets of the missionaries, who were at times accused of having undermined customary virtues and brought about the destruction of established values rather than the substitution of higher ones.

*Id.*

24. For a comprehensive review of the creation and operation of African administration, see GHAI & MCAUSLAN, *supra* note 15. For the argument that African authorities, as constituted by colonial regimes, harmed African communities, see MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1996).

pluralism as a more accurate conception of law. They challenged the very core of colonialism by promoting the doctrine of political and economic self-determination of peoples in public international law, and by engineering a power shift away from sovereign states to international institutions such as the United Nations.<sup>25</sup> Lugard's legal dualism as practiced in the late colonial period however failed to accomplish the aims of this view. There was no reversal of land expropriation nor a serious attempt to revitalize customary law institutions ravaged by colonial legal machinations. Instead, there was grafting of formal institutions supposedly administering customary law onto a broken social system. The problems that ensued only convinced the colonial government of the superiority of English moral and economic individualism. The real purpose of legal dualism became to promote the eradication of customary marriages by providing avenues and incentives for their conversion to Western-type marriages.<sup>26</sup> A similar sensibility informed late colonial land law policy.<sup>27</sup>

A conversion marriage was at par with a Christian marriage meaning it was monogamous. English not customary law governed it.<sup>28</sup> It was unlawful to attempt a conversion of a Christian marriage

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25. Kennedy, *supra* note 5, at 21, 47.

26. Cotran, *supra* note 4, at 23.

27. M. P. K. SORRENSON, LAND REFORM IN KIKUYU COUNTRY: A STUDY IN GOVERNMENT POLICY (1967); M. P. K. SORRENSON, ORIGINS OF EUROPEAN SETTLEMENT IN KENYA (1968).

28. In *Cole*, a couple had married under a Christian marriage ordinance. Upon the death of the husband, his brother claimed that he was entitled to inherit his brother's property and to be trustee of his brother's lunatic [sic] son over the protestations of the widow. Ordering that the English law of succession govern, Judge Brandford Griffith noted:

It is a consequence of the loose tie of the native marriage that by strict native law a man's eldest brother on his mother's side inherits. The brother is part of the man's family. The wife and her children are part of the wife's family. . . . In fact a Christian marriage clothes the parties to such a marriage and their offspring with a status unknown to native law. . . . To subject a man who marries under Christian law to native law and custom is inconsistent with principles of justice, equity and good conscience "Were such a contention to hold good, then an educated native Lagos gentleman — maybe a doctor, or a barrister, or a clergyman, or a bishop (for there are all such) — marrying an educated native lady out of the Colony and coming to reside permanently in Lagos would have his estate subject to native law in case he died intestate, his widow being required by a strict undiluted native law to act as wife to her brother-in-law in order to obtain support. . . . I am of the opinion that this is a case in which the court ought not to observe the native law of inheritance.

*Cole v. Cole*, [1898] 1 NLR 15 (Nigeria).

to a customary marriage.<sup>29</sup> Conversion stopped the application of customary law to the converter's family matters. It provided an escape from customary law obligations without necessarily suspending customary law entitlements. It therefore had economic distributive consequences that created winners and losers. The act of inclusive subordination did not eliminate the customary sphere but it defined its relationship with regard to the state and market. Formal law legislated the possibility of customary property rights or customary monogamy out of the customary sphere, presenting this as features of the formal regime even more starkly. The only difference in this era is that Africans could exercise the "choice" to cross over and were not punished with invalidity for not doing so.

The colonial government expressed its opposition to customary marriages in a variety of ways. The least accommodating regime, for example South Africa, recognized customary marriages but did not consider them legal marriages.<sup>30</sup> The most accommodating regime statutorily modified certain aspects of customary marriage, for instance to require registration, then attached the full benefits of marriage.<sup>31</sup>

The more people crossed over to the Western-type marriage, the more the two spheres intersected, with important distributive effects that seemed contrary to the very idea of market certainty that the colonial government wanted to promote. Far from producing certainty and predictability, colonial family law generated incoherence and injustice. Proponents of reform would later argue that courts during this era had produced vastly disconnected legal decisions that did nothing to develop customary law into a rational doctrinal legal system.<sup>32</sup>

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29. BANDA, *supra* note 7, at vv.

30. Consider:

The fact remains that it is the traditional 'marriage' of the Bantu; that even today millions of Bantu couples in South Africa are joined in this form of matrimonial relationship; and that South African law, though it does not accept the union as a legal marriage, grants recognition to it in important respects. Section (11) (1) of the Native Administration Act, after providing that native law is not to be applied where it is opposed to the principles of public policy or natural justice, expressly states that 'it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to public policy or natural justice.

Hahlo, *supra* note 4.

31. Cotran, *supra* note 4, at 26.

32. Lloyd Fallers, *Customary Law in the New African States*, in *AFRICAN LAW: NEW LAW FOR NEW NATIONS* 71 (Hans Wolfgang Baade ed., 1963); Rheinstein, *supra* note 1.

The effect of conversion was to create a "monogamous legal marriage" and to dissolve all preexisting customary law marriages and to render them adulterous liaisons.<sup>33</sup> Upon conversion to Christianity, hitherto polygamous husbands were required to choose one customary law wife with whom to contract a Christian marriage and to abandon the rest.<sup>34</sup> This was a shocking and traumatic outcome for women not chosen. Extensive pauperization of this sought was hardly flattering to the socially inclined colonial legal dualism.

In addition, even a wholly monogamous conversion, for instance where never before married individuals first observed customary law before solemnizing a statutory union, the dual character of such a marriage brought African courts and regular courts into jurisdictional conflict. Would African courts have jurisdiction over the customary portion of the marriage, specifically the return of bride price as a crucial signifier of an effective customary law divorce or would a statutory divorce suffice?<sup>35</sup> The parties might have argued that they did not fall under the exclusive jurisdiction of courts charged with enforcing the Christian form of marriage and seek divorce under customary law if its procedures were less restrictive or accessible or if such a move was important in their community.<sup>36</sup> The specter of returning dowry might have dissuaded the man from customary adjudication, leaving customary expectations unmet. Alternatively, the specter of complying with the English Married Women's Property Act, received in most colonial jurisdictions, would have encouraged resort to customary adjudication.

The rule that Africans entering into Christian marriages had been stripped of their African identity and were therefore not governed by customary law was disingenuous, was never given its full effect, and was another instance where systemic incoherence produced distributional unfairness. In formal logic, converting Africans should not have been allowed customary law inheritance once they had opted out of that system. This was not the case however. They remained fully entitled to their share of family property under customary law even after conversion marriages. This equivocation was a practical necessity, given the nature of the African family as a unit of economic production.<sup>37</sup> At the same time,

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33. Hahlo, *supra* note 4, at 147.

34. Morris, *supra* note 9.

35. FAMILY LAW IN ASIA AND AFRICA: 143 (J. N. D. Anderson ed., 1968).

36. *Id.*

37. *Infra*, part III.



converts could use their choice of Christian marriage law to prevent members of their extended family from asserting rights of succession recognized by customary law, on the assumption that wealth acquired during the Christian marriage was exclusively held.<sup>38</sup> Those seeking to streamline family law grappled with the question whether to decouple the law of marriage from that of succession to avoid such outcomes.<sup>39</sup>

Changes in the statutory marriage regime sometimes had unforeseeable effects on customary marriage regimes, and vice versa. For example, when the prohibition of adultery in the Ugandan colonial Penal Code was repealed but customary law forbidding adultery remained enforceable, African husbands who had contracted Christian marriages were in a very precarious situation. While customary law husbands could use customary law provisions to have Christian husbands jailed for committing adultery with their wives, Christian husbands did not have the same advantage. Here we must note that colonial conferral of penal authority on African courts and institutions led to a criminalization of what in the precolonial era were merely civil claims.<sup>40</sup> When these Christian husbands were thrown in jail for adultery, they did not have recourse in the event that their wives strayed in their absence.<sup>41</sup> This problem could not be corrected through a repeal of criminal customary law. Construing territorial law in the Penal Code to override customary law was legally sensible but politically untenable. To maintain a balance of governing power in the context of legal dualism, sensible concessions to African authority had to be made even if they produced profoundly contradictory outcomes.

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38. THE FUTURE OF LAW IN AFRICA: RECORD OF PROCEEDINGS OF THE LONDON CONFERENCE, 28 DECEMBER 1959-8 JANUARY 1960 (A. N. Allot ed., Butterworth 1960).

39. Gordon R. Woodman, *Ghana Reforms the Law of Intestate Succession*, 29 J. AFR. L. 118 (1985).

40. Phillips, *supra* note 1, at 91:

native courts in the British territories are usually empowered to try "offenses against native law and custom." One of the most frequent instances is adultery: African customary law would formerly have regarded this (as does modern English law) as normally giving rise to nothing more than a civil claim for compensation, but African opinion at the present day demands its repression by means of criminal proceedings - i.e. by the modern penal sanctions of fine and imprisonment. The recognition of a native law of crimes may thus involve a certain element of fiction, in so far as it invokes the authority of indigenous custom.

*Id.*

41. Morris, *supra* note 9.

The problems of incoherence and injustice described provided the impetus for dismantling legal dualism as a doctrine of governance, and was the *raison d'être* for the anti-colonial nationalist rebellion. Family law was constitutive of the postcolonial state not only in this way, but also by being a critical link to postcolonial orientation to market-based economic development.

## **II. Marriage and Economy: The Social View of Law and the Doctrinal Development of Postcolonial Family Law**

The demise of colonialism at mid-twentieth century ushered in an era of great excitement about the transplantation of new laws to the new nations of Africa or the adoption of laws received during the colonial period to their nascent visions of prosperity. With this excitement came deep concern that customary law, which governed land and family relationships, was unsuitable to the demands of the moment and incompatible with these economic modernization laws. Statecraft was the art of designing whole legal systems for the purpose of promoting the rule of law defined as liberal constitutionalism and respect for private property rights and contractual freedom. As defined by adherents of the classical tradition in the early colonial period and proponents of legal dualism in the late colonial era, customary law threatened the success of new nations. The land ownership and marriage practices it endorsed were inconsistent with the rule of law paradigm broadly broached as a universal model for statehood by international law jurists.

Two ways of thinking about the future of customary law in postcolonial Africa emerged. Rejecting calls for the abolition of customary law made by scholars such as Professor Rene David, scholars such as Professors Eugene Cotran and Anthony Allott, whose work I will analyze here, took the view that a grassroots understanding of customary law was lacking in international academic and bureaucratic circles. Following in the footsteps of ethnographers, anthropologists, and economists, but rejecting their pronouncements on customary law as non-authoritative for judicial purposes, they set out to establish the real content and character of customary law. They sent interview panels around the continent to gather information from the people about their law and to record this law into what they called the "Restatements of Customary Law," tribe-by-tribe accounts later formed the basis for internal doctrinal systematization of customary law and its ultimate harmonization with national and international laws. I will label the intellectual work done to justify and develop the project of

restatement as "Doctrinal Staging I" and that of the production of doctrinal coherence for purposes of national and international integration as "Doctrinal Staging II." In the former, scholars made elaborate arguments about the relevance of customary law to the modern African state, particularly its compatibility with the economic development agenda. The crux of their argument was that economic individualism was characteristic of customary law as practiced by the people. Representations to the contrary were, being of positive customary law developed by colonial functionaries that were out of touch with the people, mistaken. In the latter, disparate tribal customs recorded in the Restatements were synthesized into singular national customary family laws. This was achieved by setting apart rules common to all groups as general rules to be applied by courts in all cases. Rules unique to a particular group were not part of the general scheme and would be vulnerable to broad judicial discretion and possible exclusion through legislation. While the work of aggregating and categorizing customary rules was undertaken by scholars usually on government commission, that of progressive reformation of the artifact they provided lay squarely in the courts. The judge was the celebrated trustee of the Anglo-American social view of law in Africa.

The power of this view of law lay in shifting focus from sterile African/Western conceptualism to an instrumental focus on law as a tool for social adaptation and development.<sup>42</sup> In restating and codifying customary law, reformers captured what colonial law had obliterated, the "economic man" as an important figure of mid-twentieth century Africa who straddled many legally constructed worlds and used myriad systems of law in the process. From then on, customary law, and the family, acquired national and international significance. States, international institutions and transnational investors had to understand its political and economic import to advance their interests. Academics and civil society groups often found themselves at loggerheads. Comparativists needed to convince internationalists that robust legal pluralism did not hinder human rights and the rule of law and that it was not another conceptual gimmick to prevent the alignment of the family, group, or community with individual rights and market freedom.<sup>43</sup> By arguing that

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42. Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. Ill. L. Rev. 597 (1994); Kennedy, *supra* note 5 (discussing acceptance of legal pluralism especially in Anglo-American business dispute resolution); Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777 (2010).

43. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 Utah L. Rev. 545 (1997).

customary law was economic law, reformers demonstrated that it was not just a "family law," it did not derive its legitimacy from fossilization as "tradition" but from renewal and adaptation in modernity. As such, it could become compatible with the new rule of law paradigm through systematic reform to bolster its economic advantages and negate that which was merely cultural, such as dowry and polygamy, that had no other function than totemic or status significance. So no, legal pluralism would not be a threat to the global march of market capitalism, but in it all, it would leave the individual rooted in her social context. In Part IV, I will discuss the impact of this diffusion of legal thought, conceptual templates, and reasoning techniques on the production of national family law regimes.

### A. Economic Individualism as African Social Reality

When law ceases to reflect social reality, the people it expects to govern circumvent it. This, mid-twentieth century socio-legal reformers argued, was the fate of colonial family law. The customary law applied and enforced by colonial courts was a creature of archaic presuppositions about the African worldview, and it fitted poorly with other laws. At a time of fervent economic transformation and opportunity, it stifled individual choice in the name of Africanness. For example, many converted customary marriages in order to acquire marriage certificates, typically given for statutory but not for customary marriages, but newly required by lending institutions and landlords, and in some cases to access government services.<sup>44</sup> Converters however remained faithful to the customary legal system in every other way. Another example - the emergent postcolonial elite combined customary and statutory law in unprecedented ways in order to gobble up resources liquidated by departing settlers.<sup>45</sup>

At two conferences held in Amsterdam in 1955<sup>46</sup> and in London in 1959,<sup>47</sup> and in various writings thereafter,<sup>48</sup> an emergent

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44. Janet Kabeberi-Macharia & Celestine Nyamu, *Marriage by Affidavit: Developing Alternative Laws on Cohabitation in Kenya*, in *THE CHANGING FAMILY: INTERNATIONAL PERSPECTIVES ON THE FAMILY AND FAMILY LAW* (J. Eekelaar & Robert T. Nhlapo eds., 1998).

45. OKOTH-OGENDO, *supra* note 17.

46. *THE FUTURE OF CUSTOMARY LAW IN AFRICA* (Afrika Instituut Leiden 1956).

47. *THE FUTURE OF LAW IN AFRICA*, *supra* note 38.

48. T. OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* (1956); Fallers, *supra* note 32. Richard L. Abel, *Customary Laws of Wrongs in Kenya: An Essay in Research Method*, 17 AM. J. COMP. L. 573 (1969); Francis Mading Deng, *The Future of Customary Law in the Sudan*, 11 MALAYA L. REV. 268 (1969); F. A. Ajayi, *The Future of Customary Law in Nigeria*, in *THE FUTURE OF CUSTOMARY LAW IN AFRICA* 42-49 (Afrika Instituut Leiden 1956); *The Future of Law in Africa*, *supra* note 38.

community of internationally renowned scholars pondered the future of customary law in postcolonial Africa. They concluded that in the hopes of keeping customary law pure and organic, colonialists had left it in the hands of traditionalists rather than modern Africans; the "traditional man" rather than the "best man,"<sup>49</sup> and had institutionalized community control of the individual.<sup>50</sup> The customary law enforced by colonial institutions was a caricature of the real customary law practiced by the people. Skewed in favor of the colonial status quo, the people had every reason to circumvent it, and they did.<sup>51</sup>

Africans were acting contrary to the expectations of the state by pursuing economic opportunities on an individual basis and modifying customary law to suit individual preference. F. A. Ajayi, a Nigerian jurist, invoking Maine's evolutionary institutionalism explained:

In the sphere of Private Law, there is ample evidence in Nigeria today, whatever exceptions may be found to it elsewhere, of Maine's famous generalization that "the movement of progressive societies has hitherto been a movement from status to contract". As DIEDERICH WESTERMANN has observed "The outstanding phenomenon in social development (i.e. in Africa) today is the emergence of the individual from the group". This movement, this emergence, has made a tremendous impact on various phases of customary Private Law and has led to radical modification of many of its old concepts whether as relating to Land Tenure, or to Domestic Relations, Succession etc.<sup>52</sup>

P. J. Idenburg agreed with Ajayi that Africa, unable to weather Western economic and religious penetration, and liberal ideology, was moving towards individualism:

In many regions of Africa we may witness the development of a tendency towards the autonomy of the individual's personality. We have here an extremely remarkable phenomenon, which will not fail to make its influence felt on every aspect of life, and also, therefore, on a great many sections of customary law. This development is being stimulated by the principle of liberalism, which carries, in the contacts between Europeans and Africans, a power that may be compared to that behind the industrial

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49. Ajayi, *supra* note 48, at 52.

50. *Id.*

51. MAMDANI, *supra* note 24; L. Amede Obiora, *Reconsidering African Customary Law*, 17 LEGAL STUD. F. 217 (1993-1994).

52. Ajayi, *supra* note 48, at 59.

revolution in the first half of the 19<sup>th</sup> century in Europe. Neither should we forget the influence of the church missions in favour of this development.<sup>53</sup>

Noting Africa's turn to individualism, reformers argued that Africans were "naturally" responding to pressures and pleasures of their interaction with the West.<sup>54</sup> They observed that individuals were taking advantage of new laws that promoted individual land ownership and corrected the inefficiencies of traditional land tenure. New individual rights granted by the state had greater market value than traditional rights originating from the family.

The emergence of single as distinct from the customary composite families and the ready answer which the free disposition of land provides to many a modern economic need have led to a modification of the former concepts of absolute inalienability of land and of its holding in group ownership. Disposal of land now takes place in many large towns whether in the form of leases, mortgages or out-and-out sales. The concept of individual ownership has made its appearance in urban and rural areas alike, and though the customary ideas of family and communal ownership still hold most of the field, one can foresee that it is only a matter of time, though perhaps a long time yet, when they will become the exceptions rather than the general rule.<sup>55</sup>

Ajayi also pointed to the decline of group control over individual family matters as another indication of Africa's turn to individualism. This decline manifested itself through new customary rules or through rejection of old ones. Rules on how and with whom to commence a customary marriage were being ignored or modified without penalty. Rules on dissolution and custody were also not strictly followed. For example, in place of residency and membership rules, the best interests of the child rule was widely accepted.<sup>56</sup> Each one of these examples pointed to one thing –

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53. P. J. Idenburg, *Preface*, THE FUTURE OF CUSTOMARY LAW IN AFRICA, at ix (Afrika Instituut Leiden 1956).

54. Rheinstein, *supra* note 1, at 451.

55. Ajayi, *supra* note 48, at 60.

56. Ajayi, *supra* note 48, at 62. Yet, on domestic relations reform, Ajayi advised caution:

Here indeed is a sphere of Customary Law where for the future changes would probably have to be left as much as possible to the rising standard of general enlightenment, and official regulation be resorted to only where effective enforcement will be possible and the interests of social welfare clearly demands it.

Ajayi, *supra* note 48, at 62.

customary law's acceptance of individual freedom, choice, and consent, all without formal state intervention.

## **B. Doctrinal Staging I: Eugene Cotran's Formal and Antony Allott's Substantive Template for Modern African Family Law**

Rejecting the customary law developed by colonial institutions, socio-legal reformers went to the people to ascertain and record the content of real customary law as they practiced it. This project of ascertainment and recordation is known as the Restatement Project and the books it produced are generally referred to as the "Restatements." Several nuggets of Anglo-American legal thought influenced this moment. One is of course the idea that law ought to reflect social reality, popularized by legal realists such as Dean Roscoe Pound. Reformers objected that the aim of colonial institutions had been to preserve not to develop customary law.<sup>57</sup> Colonial judges had not exerted themselves professionally and intellectually to establish the content of customary law and this disconnected their work from the lived reality of disputants and their communities. They sometimes even applied English law in the name of applying customary law.<sup>58</sup> The second idea, popularized by another legal realist, Karl Llewellyn, is that recording informal law would make it ascertainable by courts, and would put it in a form amenable to reform by courts, and that judicial reform was as legitimate as reform by legislatures. Legal representation would assume a Holmesian dimension, namely, lawyers making prophesies about what the courts would do in specific circumstances rather than speculating on what nonlawyers in villages would say the law was.<sup>59</sup> Down the road, the two ideas would encounter a third, advanced by the early proponents of the law and development movement, that postcolonial economic development required the rule of law.<sup>60</sup> In time, particularly during the neoliberal era, international financial institutions pegged a nation's economic advancement prospects on its progress along this path of reform.<sup>61</sup>

These Anglo-American influences had a special resonance

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57. Cotran, *supra* note 4, at 26.

58. Cotran, *supra* note 4.

59. Gordon R. Woodman, *Some Realism About Customary Law - The West African Experience*, 1969 WIS. L. REV. 128 (1969). Oliver Wendell Holmes, *The Path of Law*, 10 Harv. L. Rev. 457 (1897).

60. David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974).

61. Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513 (2005).

because the postcolonial moment brought conflicts between tradition and modernity to the fore. Socio-legal reformers rejected assertions of tradition reminiscent of the colonial era and went out to provide a framework that would preserve customary law not as tradition but as living law administrable by modern courts.

[T]here is little evidence of a rooted conservatism resistant to the forces of change. But adaptation requires more than a willingness to change; it also requires techniques for maintaining a satisfactory degree of consistency and unity in the law as the various courts applying it encounter and respond to new problems. In the Anglo-American legal tradition, such consistency is maintained through systems of reporting by means of which courts are made aware of precedent-setting decisions. . . . African customary law is an excellent example of what Max Weber called "substantive legal irrationality." Decisions are reached by judges on the basis of an implicit body of normative rules which may be highly consistent internally, but these rules are seldom made explicit and formally manipulated in the decisions that are rendered.<sup>62</sup>

Professors Eugene Cotran and Antony Allott of the School of African and Oriental Studies, London, were the pioneers of the Restatement Project. In my view, they made at least two concrete contributions to comparative legal thought. In a manner reminiscent of Anglo-American legal realism, they provided postcolonial courts with a doctrinal template from which to decide customary law cases, the subject of this section, and a flexible scheme of customary law rules amenable to judicial reform, which I discuss in the next section.

To make the case for the ascertainment of African customary law, Professor Cotran, surprisingly, invoked *Hyde v. Hyde*<sup>63</sup> This is the 1866 English case we encountered in Part II that defined marriage as the "voluntary union for life of one man and one woman to the exclusion of all others." On its authority, early colonial courts had declared customary law marriages invalid. In his view, nowhere could you find the difference between English and African views of marriage more starkly stated:

[A]lmost every single word of this Christian definition of marriage is inapplicable to marriages contracted under the traditional African customary law. It is argued, first, that in many African societies marriage was not a voluntary union, especially as far as brides were concerned; secondly, that the union was not for life since it might be easily dissolved without the intervention of a

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62. Fallers, *supra* note 32.

63. Contran, *supra* note 4, at 15 (discussing *Hyde v. Hyde*, [1866] L.R. 1 P. & D. 130).



court; thirdly, that the marriage was not so much a union between a man and a woman, as an alliance between two family groups; and finally, that far from being a union to the exclusion of all others, all customary marriages were potentially polygamous.<sup>64</sup>

Cotran added the following four to the above list of distinguishing: long and complex formalities and ceremonies which made it difficult to know at what point a marriage took effect; dowry payments to the bride's family by the groom's family; "emphasis on procreation as the prime end of marriage"; and the social and legal inferiority of the wife.<sup>65</sup>

The typology Cotran developed manifests a familiar tension in classical liberal legal thought — that between individualism and communalism but which is presented as a natural distinction between African and Western worldviews. In the violent, coercive, and hierarchical ordering of the African/Western encounter, individualism is attributed to the West and communalism to African.<sup>66</sup> In fact, Anglo-American jurists have shown that individualism and communalism are two sides of the same coin, inseparable and present in Western society as much as anywhere.<sup>67</sup> Cotran's typology therefore more than simply describes the two societies. As the third column of the chart below shows, the seven factors of the African/Western marriage typology correspond to important conceptual building blocks of the postcolonial African legal order.<sup>68</sup> The critical role family law plays in aligning Africa with the high aspirations of twentieth century progressive liberalism is evident.<sup>69</sup>

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64. Cotran, *supra* note 4, at 15.

65. Cotran, *supra* note 4, at 17-20.

66. PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 175 (2001).

67. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1975-1976) (argues that the same tension between community and individual free will inheres in Anglo-American legal thought).

68. Philomila Tsoukala, *Marrying Family Law to the Nation*, 58 AM. J. COMP. L. 873 (2010) (discusses the role of Greek family law in the constitution of the European statehood).

69. BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* (1999).

<b>Distinguishing Characteristics of an African Customary Marriage</b>	<b>Distinguishing Characteristics of an English Marriage</b>	<b>Aspirations of Mid-20<sup>th</sup>-Century Reform Jurisprudence</b>
Involuntary	Voluntary, consensual, age defined	Constitutional democratic governance
Non-judicial dissolution, at will dissolution	Union for life that is impossible or later difficult to dissolve; judicial dissolution only	Bureaucratic institutionalization of society
Alliance between two family groups	Union of one man, one woman, individual contract	Moving society from status to contract; individual free will
Legal and social inferiority of wife	Wife equal to husband	Fundamental individual human rights and freedoms
Polygamous or potentially polygamous	Exclusive, monogamous	Moral individualism; economic individualism; private property rights
Uncertainty of creation	Definite formalities of creation	Formal legal rationality; prescriptive certainty
Dowry an essential element	No dowry requirement	Human dignity, gender equality
Procreation as the end of marriage	Love as the end of marriage	Emergence of private sphere of intimacy as separate from the public sphere of states and markets

Cotran noted that, during colonial rule, customary “marriage” was considered so unlike English marriage that it could not be given remotely similar legal recognition. This construction was an error: he rejected *Hyde* and its progeny. He did not agree with the characterization of African customary relationships as wife

purchase, concubinage, customary unions, and casual liaisons.<sup>70</sup> Neither did he agree with the repugnancy doctrine as applied by colonial courts. Endorsing socio-legal pluralism and therefore rejecting classical legal positivism (that only the state could define marriage), he held the view that multiplicity and diversity of tribal systems made concrete definitions of marriage impossible. It was not necessary to engage in the search for a definition of marriage and it was meaningless to make concrete definitions the basis for law. Instead, from the actual practice of African communities, one could distill rules that cut across almost all tribes. These general rules would provide points of uniformity and continuity which taken together would aggregate into a national customary family law.<sup>71</sup> Ascertainable by courts, these general rules would promote legal and economic certainty to citizens, and would protect them from exploitation as spouses, children, or property owners. Further, a law defined by the people and reflecting their practices stood a better chance of success than imposed law. More importantly, such a law affirmed economic individualism as a desirable basis for law in Africa.<sup>72</sup> A discerning reader will notice that in making this argument, Cotran was rejecting something that Professor Felix Cohen, a preeminent legal realist, had earlier critiqued — the obsession classical jurists had with terminological exactitude and binary schemes of thought that supposedly allowed law to be applied to facts with scientific exactitude.<sup>73</sup>

Even though Cotran objected to classical positivist invalidation of customary marriages, he did not question its characterizations of the African, or even of the Western family, as directly and clearly as did Professor Antony Allott, his counterpart in the Restatement Project. Allott argued that African and Western views of family were very similar if one looked at the social function of the institution of family rather than at its formal attributes, and ultimately rejected the individualism/communalism binary as a nineteenth century legal fiction.

The judges in England, aided by the legislator, are trying to rebuild a legally-structured integrated family system after the ravages of individualism have done their worst. A new family

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70. Cotran, *supra* note 4; Morris, *supra* note 9.

71. Cotran, *supra* note 4.

72. Woodman, *supra* note 59. See also Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431 (1930).

73. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

property system, according shares or claims to wife and children over the property of the main wage-earner, may well result — something like this is already roughly achieved through the various presumptions of law and the contributions of employed married women to the household resources. It would be a tragedy if, as so often seems to be the case, the laws in England and in West Africa move in opposite directions, the West African law towards nineteenth-century English individualism whilst the English law moves towards the 'African' concept of the integrated family or household production or property controlling unit.<sup>74</sup>

To Allott, the African family could become comprehensible to the English lawyer just by looking at the similarities between its social functions and those of basic English institutions such as the limited liability company, trusts, joint tenancies and even clubs. Allott noted that the organization scheme of the African family into sublineages and households making up lineages, each with a head bearing concrete legal obligations, while producing an institution unknown to English law, namely, the family property system, played functions similar to those performed by English legal institutions.<sup>75</sup> The African family property system was more than a sphere of intimacy. It was a zone of capital production and investment, providing economic security across generations. As such, the very elements that Cotran's typology highlighted as distinctive to the African marriage form were comprehensible to an English lawyer looking at the African family through the lens of English corporate or property law. These branches of English law were attuned to balancing individual free will and community interests than classical English family law of *Hyde's* time, which was steeped in absolute individualism.<sup>76</sup> Allott's then was a theory of family that adopted Hohfeldian analytical rights framework, celebrated in Anglo-American legal thought as an important basis for realist and pragmatic legal thought.<sup>77</sup>

To carry out its economic functions, the family, like the corporation, needed to balance between individual freedom and community interests. Allott argued that the family property system he described laid out significant protections of the individual. The

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74. Allott, *supra* note 22, at 141.

75. *Id.* at 121.

76. For comparable analysis of the Chinese conceptions of family, see Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000).

77. Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WISC. L. REV. 975 (1982); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

authority of the head of household could be challenged in many ways and certainly through a process similar to accounting proceedings under English common ownership law. Disagreements among sublineages or between a head of household and immediate family members over ownership could be resolved through partition, also an English common law remedy. Incompetent heads of household had been replaced even by putting a female in charge.<sup>78</sup> Moreover, flexibility and dynamism were essential characteristics of customary law such that avenues for individuals to escape community control abound; for instance, self-acquired property was the property of the individual by whose efforts the property was acquired, even if such property had intermingled with family property.<sup>79</sup> Besides individuals used modern devices such as wills, marriage registration, and land registration to signal to family members that they desired to conduct certain aspects of their intimate or commercial life outside the group's consultative and adjudicative avenues.<sup>80</sup>

Taken together, Cotran's and Allott's depictions of the family, the one formal and the other social, armed postcolonial courts to take the reins of postcolonial legal development because they were dynamic templates of formal rules and substantive principles of customary law. If courts followed this template, judicial decisions would be both doctrinally sound and socially dynamic. As I hope to show below, postcolonial courts adopted this dual structure to resolve family law disputes triggered by economic development programs and modernization. For example, they followed Cotran's checklist of elements to determine the legal threshold for marriage validity, and Allott's enumeration of the social function of family law as an interpretative framework for resolving disputes between family members and unscrupulous heads of household bent on robbing widows of marital property. By providing complementary templates for judicial development of doctrines of customary family law, they advanced a way of thinking about the adjudicative function that was at core reminiscent of mid-twentieth century Anglo-American social view of law.<sup>81</sup> Further, beyond equipping courts with a socially pliable doctrinal template, they elevated African customary law to global relevance. They set it on a modernization path similar in design to that of Anglo-American law

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78. ELIAS, *supra* note 3.

79. Allott, *supra* note 22.

80. Ajayi, *supra* note 48. *But see* Virginia Edith Wamboi Otieno v. Joash Ochieng Ugo and Omolo Siranga, (1987) 1 K.A.R. 1049 (Kenya).

81. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1998).

by linking it to post-World War II global sensibility about the rule of law, human rights, and economic development, as depicted in the chart above. While this may seem typical, third world family law is always under the international legal microscope, often unstated is its ability to absorb the effects of global economic dysfunction and actualize market certainty in the process.

### C. Doctrinal Staging II: From Restatement to Casebook on African Customary Law

Professors Cotran and Allott undertook the Restatement Project because they did not think that anthropological works of the first half of the twentieth century had produced an authoritative statement of customary law useable by modern courts.<sup>82</sup> They also faulted colonial courts for not producing an accurate customary law. Neither one, anthropological accounts nor decisions of colonial courts, could be relied upon as authoritative. Professor Dennis Cowen, a professor of law at the University of Chicago and director of its Center for Legal Research in New Nations described the work at hand as follows:

It is one thing, for example, to say that various systems of "customary law" operate in Africa; it is quite another to ascertain with precision what rules these systems prescribe, and what are the similarities and differences between the systems themselves. Precise ground work of this kind is difficult and laborious, but essential. It is essential because where, as is often the case, it is sought to change or build upon a customary institution, one should know exactly what one is dealing with. It is difficult work because . . . customary law often lacks, or defies circumscription within, a formal or conceptual framework, and, further, what is called "customary law" in Africa is often in the process of rapid change - changing, in fact, while the work of recording goes on. Fortunately, this work is now being undertaken, on a broad scale, under the direction of Dr. A N Allott at the School of Oriental and African Studies in London.<sup>83</sup>

After writing the *Restatements* for various countries, Cotran became the secretary to Kenya's Commission on the Law of Marriage and Divorce and the Commission on the Law of Succession. These were the first comprehensive family law reform efforts by the Kenyan government with the mandate to recommend as far as practicable a

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82. Cotran, *supra* note 7. For a critique of this position, see Annelise Riles, *supra* note 42.

83. Denis V. Cowen, *African Legal Studies - A Survey of the Field and the Role of the United States*, in *AFRICAN LAW: NEW LAW FOR NEW NATIONS* 9, 15 (Hans Wolfgang Baade ed., 1963).

uniform family law code that would apply to all Kenyans. Subsequently, he served as a judge of the High Court of Kenya between 1977 and 1982. He presided over several important customary law cases, in some instances following the Restatements he had written. He published in 1987 the *Casebook on Kenya Customary Law* (hereafter the *Casebook*), a collection of customary law cases decided by the highest courts in Kenya adhering to common law methods of adjudication. From reader in African Law at SOAS, to colonial/postcolonial law reform expert, to Kenya high court judge, Cotran weaved a long and distinguished career, outstanding for traversing wide terrain using comparative law methodology.

Even though cast as a modest effort to make customary law ascertainable by courts, the restatement project was much more. Consider the law of marriage as presented in the *Casebook* — we learn that a customary marriage must have certain key elements to be valid and the work of courts is to declare when parties have adduced sufficient evidence to establish those elements. It tells us that capacity and consent to marry are the two elements common to all ethnic groups for a marriage to be valid. Being general and universal, the two elements qualify to be rules of a uniform Kenya family law. Let us call them core rules. Various ethnic groups have additional requirements for a valid marriage that are unique to them. For the Kikuyu, the *Casebook* lists *ngurario* (slaughtering of a ram), *riracio* (dowry), and the commencement of cohabitation, as the three additional elements of a valid Kikuyu marriage. Let us call these unique extra elements peripheral rules. They are distinguishable from core rules because courts may modify, or in appropriate cases, abolish them with little loss to the integrity of customary law. There is an implicit assumption that the more a rule is unique to a particular tribe, the greater the likelihood that it is repugnant to justice, inconsistent with modern law, unnecessary, or inconvenient to national interests, specifically integration and harmonization interests, and thus by this criteria it should be in the second category.

Dowry, animal slaughter, and cohabitation are marriage requirements that by virtue of not being uniformly required by all ethnic communities, bear ceremonial qualities, and are therefore flexible, fluid, malleable, variable, and ultimately peripheral. When litigated in a modern postcolonial court, these rules should be subject to judicial discretion, and when the subject of legislative reform, they could be reduced to insignificance, accorded a respectful nod, or abolished. Moreover, they are best left in the realm of individual choice rather than prescription. Their

observance, partial observance, or non-observance should not affect the validity of marriage if not followed to the letter or if not followed at all. Their value as rules that define marriage in the national legal order therefore significantly reduces.

This organization of marriage law into core and peripheral rules makes African customary and Anglo-American thinking about marriage validity seamless. It is a conceptual bridge linking the two, especially useful in transition periods where citizens are likely to be in marriages that have elements of more than one regime. It is also a realist framework. Judges sit to decide cases on a spectrum of rigid to flexible rule interpretation, and there is a fair amount of uncertainty involved in litigating each case.<sup>84</sup>

The classification of an element as core or peripheral is obviously a political decision someone in Cotran's position makes. For example, although dowry among the Kikuyu signifies the consent of both the individuals marrying and their families, consent being a core rule in Cotran's scheme, he treated it as a wholly peripheral rule. He justified this by pointing out that dowry though common is not universally practiced, and further, missionaries, feminists, and progressives were united in seeking its abolition for being a violation of women's human rights. Cotran's severance of consent from dowry illustrates how the dual structure he created would work — courts and legislatures can modify or expunge peripheral rules without guilt of destroying customary law, without interfering with the heart of the modern law of marriage, and without committing treason against African national pride.

That Cotran's rule structure favors individual freedom and comports with the law of the market and international human rights is undeniable. Stripping consent off dowry consigns it to the periphery of family law and has the effect of minimizing the role of the community in formal marriage validation. Armed with the will and capacity to marry, individuals may but do not have to meet unreasonable demands of family and community assembled in marriage validating negotiations. In fact, these become more of conversations than negotiations, an important cultural shift. Dowry no longer signifies consent, it is merely ceremonial, done at the election of the parties, a dying practice probably. The core of the African customary marriage is now the same as that of the European, with allowance for peripheral embellishment and

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84. Kennedy, *supra* note 81; K. N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (U. of Okla. Press 1941); K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS Study* (Oceana Pub. 1960).



differentiation. Practice affirms this approach for postcolonial courts have since interpreted dowry, and other peripheral requirements, flexibly, and law reform activists have endorsed its abolition or modification.<sup>85</sup>

In conclusion, socio-legal reformers of mid-twentieth century produced a postcolonial family law regime that was compatible with market development and international human rights as policy aspirations that were to be balanced against local circumstances. They did this by excavating individualism from unwritten African customary law rather than by importing it readymade from Western codes. They kept the label "customary marriage" even though its doctrinal core was ultimately similar to that of statutory marriages to signal community distance from the state characteristic of legal pluralism. At the same time, they put customary law in a form usable by courts and strangers to ensure doctrinal evolution in tandem with the law of the market, constitutional governance, and social change. In the next Part, I discuss the import of what they did in the terms of legal diffusion theory.

### **III. Diffusion of Law and the Production of National Family Law Regimes**

Amidst persistent calls by academics, international organizations, governments, and civil society groups for abolition or radical reform of the customary form of marriage, one can lose sight of the fact that legal professionals and state bureaucrats have with equal persistence worked to give this form of marriage a modern doctrinal character. Though extensively maligned, as many as 80% of marriages in West Africa, for example, are contracted under customary law.<sup>86</sup> False consciousness cannot explain a number so high. For better or worse, I think the formal and substantive doctrinal sophistication of customary law discussed above provides a better explanation for its prevalence.

Postcolonial marriage law reform in Africa has been moving in two opposite directions, it seems, and that is why customary marriage is simultaneously contentious and prevalent. Reform advocates who believe that customary law impinges on individual rights and perpetuates patriarchal oppression of African women tend to think customary law is a personal system of law that governs

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85. Cotran, *supra* note 7, at 31.

86. WOMEN AND THE LAW IN WEST AFRICA: GENDER RELATIONS IN THE FAMILY – A WEST AFRICAN PERSPECTIVE (Akua Kuenyehia ed., 2003).

the private sphere of intimate relationships.<sup>87</sup> They have wanted laws that will make this sphere more equitable, resisting the idea that the customary cultural sphere should remain closed to state intervention and westernization.<sup>88</sup> They have employed strategies such as questioning the authenticity of customary law by describing it as a colonial and postcolonial elite construct wielded to fend off modernization forces and to retain traditional power systems that are oppressive and retrogressive.<sup>89</sup>

A separate category of reform advocates sees customary law as a legal regime that defies characterization as private, familial, or personal. They understand it to be unofficial or nonstate law and are concerned about problems of legal pluralism such as the threat disharmony poses to national economic and social reconstruction<sup>90</sup> or to the administration of justice,<sup>91</sup> and ultimately to the legitimacy of law.<sup>92</sup> They think the solution to these problems lies in the

87. BANDA, *supra* note 7.

88. J. Oloka-Onyango & Sylvia Tamale, "The Personal is Political," or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism, 17 HUM. RTS. Q. 691 (1995).

89. Martin Chanock, *Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform*, 3 INT'L J. L. & FAM. 72 (1989).

90. A. N. Allott, *What Is to Be Done with African Customary Law - The Experience of Problems and Reforms in Anglophone Africa from 1950*, 28 J. AFR. L. 56 (1984); David N. Smith, *Man and Law in Urban Africa: A Role for Customary Courts in the Urbanization Process*, 20 AM. J. COMP. L. 223 (1972); James S. Read, *Crime and Punishment in East Africa: The Twilight of Customary Law*, 10 HOWARD L.J. 164 (1964). Lynn Berat & Robert J. Gordon, *Customary Law in Namibia: What Should be Done?*, 24 VAND. J. TRANSNAT'L L. 633 (1991); Lynn Berat, *Customary Law in a New South Africa: A Proposal*, 15 FORDHAM INT'L L. J. 92 (1991-1992).

91. Gordon R. Woodman, *Legal Pluralism and the Search for Justice*, 40 J. Afr. L. 152 (1996); Gordon R. Woodman, *Ideological Combat and Social Observation - Recent Debate About Legal Pluralism*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 21 (1998); Vice President Akua Kuenyehia, *Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa*, 40 U.C. DAVIS L. REV. 385 (2006-2007); Johanna E. Bond, *Gender, Discourse, and Customary Law in Africa*, 83 S. CAL. L. REV. 509 (2009-2010); Johanna Bond, *Pluralism in Ghana: The Perils and Promise of Parallel Law*, 10 OR. REV. INT'L L. 391 (2008); Allison D. Kent, *Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights under Customary Law in Africa*, 28 MICH. J. INT'L L. 507 (2006-2007); Brenda Oppermann, *Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN'S L. J. 65 (2006); Anne Hellum, *Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism*, 25 LAW & SOC. INQUIRY 635 (2000).

92. WILLIAM BURNETT HARVEY, *LAW AND SOCIAL CHANGE IN GHANA*, IN *INTEGRATION OF CUSTOMARY AND MODERN LEGAL SYSTEMS IN AFRICA* (University of Ife, 1971):

The problems of relating legal norms ... arise from the fact that the legal order in Ghana is in a special sense pluralistic, encompassing not merely law derived from the former colonial power, now greatly supplemented by post-independence legislation, and a system of courts to apply that law, but

doctrinal systematization of all legal regimes whether officially or unofficially organized.<sup>93</sup> Their reform agenda involves indiscriminate diffusion of legal thought and legal techniques to streamline each regime to make it administrable by modern courts and adaptable to national modernization programs and international human rights standards.<sup>94</sup>

These two ideas reflect a split in conceptualization of the family and the state in international legal understanding. If customary law is simply family law rather than unofficial law, it poses no threat to state sovereignty, it is supremely domestic, and therefore peripheral in importance.<sup>95</sup> On the other hand, if customary law is unofficial law, it limits the reach of state sovereign power and may affect the performance of the public international legal regime.<sup>96</sup> On this score, comparative law and society theorists challenge the premises of legal positivism, which accords the state exclusive law making and enforcement power, as undermining our ability to understand the true nature of law.<sup>97</sup> The viable existence of unofficial law shows that the link between family and state cannot be severed, the two are governance institutions, and are mutually constitutive. Developing unofficial law and adopting it to national and international governance aspirations does not embolden the sphere of private intimacy any more than if it was left untouched, and is beneficial to the modern state in the long run.

Countries such as South Africa recently followed the second line of thought and passed legislation to recognize the customary form of marriage.<sup>98</sup> Their courts will have to resolve constitutional

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also a body, or more properly, bodies of indigenous or customary law applied mainly in the Native, now Local, Courts. To avoid chaos, some scheme was necessary to delimit the sphere of operation of each body of law and each system of courts and, insofar as these spheres coincided or conflicted, to determine which should prevail.

HARVEY, *supra* note 92, at 239-40.

93. Woodman, *supra* note 59.

94. Rheinstein, *supra* note 1. Robert B. Seidman, *Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa*, 1966 WIS. L. REV. 999 (1966).

95. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

96. Kennedy, *supra* note 43.

97. Riles, *supra* note 42; WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* (2006); Ralf Michaels, *The Re-Statement of Non-State Law: The State, Choice of law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209 (2005).

98. J. M. Peinaar, *African Customary Wives in South Africa: Is There Spousal Equality after the Commencement of the Recognition of Customary Marriages Act*, 14 STELLENBOSCH L. REV. 256 (2003). Mothokoa Mamashela, *New Families, New Property, New Laws: The Practical*

challenges to such statutes and formulate pragmatic solutions to the issues of gender equality and discrimination they raise.<sup>99</sup> If faced with a case that invites conceptualization of customary law as family law, rather than a form of nonstate law, for instance where a claimant seeks protection from domestic violence, they are bound to adopt the first line of thought, that customary law is merely a personal law system, and to invoke principles of individual freedom, liberty and dignity to pronounce its reform. In a case inviting conceptualization of customary law as unofficial law, on the other hand, courts will likely decide on a theory of nonstate normative orders assuming their rightful place in a plural democracy.

The African/Western colonial encounter at many levels involves conceptual and moral subjugation, and imposition of interpretative and reasoning techniques. At the heart of this violent encounter is conceptual determinism, the need to found jurisdictional authority on general determinations about how each society through its laws or customs regards the individual. If customary law tends to subordinate the individual to the family, and the family system it espouses has extensive normative and distributive functions, it poses a serious challenge to the colonial and postcolonial pursuit of market-based development. The only thing that saves customary law from complete abolition by the state is proof of its utility as a tool for positive bureaucratic governance, that is, utility beyond the sphere of family.<sup>100</sup> To have this type of utility, customary law must become individualistic and must transform the family to release resources to individual control and market exchange. The customary form of family hinders the development of the modern state not because it sanctions patriarchy and morally contentious cultural practices but because these practices are wedded to control and access to resources.<sup>101</sup>

Conceiving the pre-modern family as having no private core the liberal state is obligated to protect<sup>102</sup> justifies the diffusion of western law to provide the missing private in remote parts of the world and makes customary law a logical target of such a mission. However, the reconceptualization of the customary family by socio-legal

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*Effects of the Recognition of Customary Marriages Act*, 20 S. AFR. J. ON HUM. RTS 616 (2004).

99. Jill Zimmerman, *The Reconstitution of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACKLETTER L. J. 197 (2001).

100. Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in OXFORD HANDBOOK OF COMPARATIVE LAW 441 (Mathias Reimann & Reinhard Zimmerman eds., 2006).

101. Kerry Rittich, *Black Sites: Locating the Family and Family Law in Development*, 58 AM. J. COMP. L. 1023 (2010).

102. Marella, *supra* note 2.

reformers alters the channels of legal diffusion. Instead of the traditional western imposition geared at subordinating family to market, community to individual, there is cross-fertilization and counteraction horizontally across regimes of law and vertically from state policy to legal regime as necessary to encourage the emergence of a national legal order.

Although socio-legal reformers “discover” the economic character of customary law, it remains an irrational scheme of law unless its subject matter is organized to fit known Anglo-American family law headings and its development entrusted to common law judges who will decide whether and how to expand these foreign doctrinal casings to accommodate local eccentric matter.<sup>103</sup> They will also have the discretion to transfer more and more Western laws and schemes of legal thought into the customary realm, and to turn the flow of influence in the opposite direction.<sup>104</sup>

Although proponents of this integrative legal pluralism reject classical positivism’s position that the law is autonomous, the decision to integrate customary law into the national schemes of economic laws means they must positivize and bureaucratize it. Repackaging customary law as useful to actors in modern economies gives it a role far superior to that of impassioned ethno-national identity assertion. Of course, reformers cannot predetermine whether customary law will play the first or the second role once developed. The production of national family law regimes in many countries has involved political compromises that have relegated the family to the second role to make the transplantation of other private laws politically acceptable.<sup>105</sup>

Taking Cotran’s charge to modernize customary law, family law courts have engaged in active cross-fertilization of customary and western derived laws, but the allure of individualism and market development has preserved the latter at the top of the hierarchy of national laws. To resolve conflicts pitting tradition against modernity, courts have become crucibles for two-way legal diffusion. They are integrating customary and modern legal rules and concepts, and diminishing the hold the African/Western individualism/community conceptual divide has had in family law adjudication and national politics. I illustrate how this is the case below.

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103. Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L. J. 1031 (2003-2004).

104. Marella, *supra* note 2; William Twining, *Diffusion and Globalization Discourse*, 47 HARV. INT’L L. J. 507 (2006).

105. Kennedy, *supra* note 5, at 21, 53, 63; Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT’L L. 1043 (2004).

### A. Eccentric Claims in a Modern Era

The cases I discuss in this and the next section involve conflicts over resources believed to be under the control of the customary family. The courts must decide whether those resources will remain there or will be released to private market actors. The courts have ruled in both directions. In some cases, they have used customary law to modernize received laws that embolden customary patriarchy, but in others, they have done the opposite.

In one case, a young female sued her schoolteacher after “he had impregnated her but refused to marry her”. Unlike western law, customary law did not recognize a cause of action for a breach of promise to marry, but recognized an action for loss of virginity and pregnancy compensation where a man did not marry a female he impregnated. Sitting as an appellate judge and invoking his authorship of the Restatements of African Law, Cotran sidestepped legal technicality to eliminate the distinction between modern and customary causes of action, allowing the girl to recover under customary law rules even though her cause of action derived from English law. Lower courts had ruled that a schoolgirl suing her teacher claiming that he had impregnated her but “rejected her for a wife” and that “her future chances in life had been jeopardized by the act of the defendant” was entitled to Kenya Shillings 1,000/ in damages. On appeal, Cotran upheld the award observing:

The question remains . . . what is the basis for the award of shs. 1,000/= in compensation. Mr. Mukele argues forcefully that under Luhya customary law, which is applicable in this case, there is no action for a breach of promise to marry and he refers to Vol. 1 of the Restatement of African Law: The Law of Marriage and Divorce of which I happen to be the unfortunate author. I am, of course, prepared to accept that this is the true position under Luhya customary law but when one turns to p. 55 of the same publication, one finds that under Luhya customary law, provision is made for compensation for having sexual intercourse with an unmarried girl resulting in the loss of her virginity, that compensation therefor is one heifer and it is payable to the girl's father; and also there is provision for payment of pregnancy compensation - again to the girl's father - of one heifer. False I am informed, and I have no reason to doubt, that the average price of a heifer in the locality from which the parties come is in the region of shs. 500/= each and, therefore, it seems to me that even if I look at the strict customary law and accept it as applicable in the circumstances of this case, the net result would be precisely the same.<sup>106</sup>

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106. COTRAN, *supra* note 7, at 3-4 (Mamati).

In a move that would seem to embolden customary patriarchy, Cotran then ruled that the fact that customary law remedies were payable to the father of the girl rather than to the girl, the plaintiff in the suit, was a technicality that could not defeat the claim.

His ruling is interesting at many levels. First, he refused to allow a legal technicality to forestall recovery by equating the English idea of breach of promise to marry with the customary law loss of virginity and pregnancy compensation causes of action. Noting that the Affiliation Act, which would have required payment of child support by a child's father, had been abolished in Kenya at the time, he signaled courts should act where the legislature had failed to do so. He thus used customary law to advance a just outcome where the tools of modern law were besieged by legal technicality and legislative impasse. In taking this approach, he overturned long held biases against customary law's fairness as compared to statutory law.

Cotran's award of the monetary equivalent of a customary heifer presents some fascinating complexities. It was consistent with his commitment to making customary law adaptable to changed conditions. A heifer is fungible; with the monetary award, the plaintiff was free to acquire another in the marketplace. Monetizing customary law compensation was convenient and ultimately efficient. However, if one looks at pregnancy compensation as being about repairing frayed community relationships rather than remedying computable loss, Cotran's innovation actually discouraged community members from judicial dispute resolution, something he had worked hard to promote.<sup>107</sup> If redressing loss and addressing legislative impasse was the issue, then the man should have been liable for much more.

Yet, monetizing damages reduced community control over the individual by lessening the sense that the grievance was about violation of family honor after the loss of virginity of an unmarried girl. At the same time, by not taking issue with a father taking compensation owed a daughter, Cotran paid homage to the communitarian ethic in most family law regimes, even though his alternate posture was to advocate reform of African customary law to reflect the emerging reality of heightened individualism.

*Mamati* demonstrates a deep anxiety that monetization changes

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107. Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. J. INT'L. L. & POL'Y 791 (1994-1995); Igor Kopytoff, *The Cultural Biography of Things: Commoditization as Process*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 64 (Arjun Appadurai ed., 1986).

the meaning of important customary law questions such as whether the purpose of customary legal process is to make the individual whole or to restore harmonious community relations; whether dowry as an element of a valid customary law marriage amounts to wife purchase or to community ratification of the new union.<sup>108</sup> By equating English breach of promise to marry with loss of virginity and pregnancy compensation actions, and by approving settlement to the plaintiff's father rather than to the plaintiff herself, Cotran's doctrinal template retained communitarian elements in a modern family law schema.

## B. Marriage Law and Economic Development

The development of family law in Africa correlates directly with the development of the modern state, which pursues market-based development by forcing the release of resources controlled by the customary family to private market actors. The route to this model of development is through the systemic transformation of customary family law. The idea is to move societies broadly categorized as pre-modern and traditional from status to contract.<sup>109</sup> This Article helps us understand how diffusion of legal thought simultaneously enables and frustrates this pursuit.

The treatment the claimant's father received in *Mamati* is very different from the treatment heads of households embroiled in land disputes with married women have received. Many customary heads of households became registered titleholders of what had always been commonly owned as family property. Courts had to decide whether registered title gave them exclusive property rights over such land and extinguished preexisting customary law interests. Registered title was favored by the state because it increased rural agricultural production which in turn supported of import substitution economies, scheme that feminists criticized as subsidizing patriarchy and male ownership of resources.<sup>110</sup> This initial advantage served the new class of titled individual landowners well. They could access finance markets using land as collateral in ways that other members of the family unit could not. This reduced such family members to dependency and turned them into a source of cheap labor on land that they previously owned

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108. BANDA, *supra* note 7 (many meanings of dowry).

109. Joel M. Ngugi, *Forgetting Lochner in the Journey from Plan to Market: The Framing Effect of the Market Rhetoric in Market Oriented Reforms*, 56 BUFF. L. REV. 1 (2008).

110. ESTER BOSERUP, WOMAN'S ROLE IN ECONOMIC DEVELOPMENT (2007); Celestine L. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L. J. 381 (2000).



under customary law.

Further, by becoming land titleholders, heads of households also became owners of produce harvested from the land, which if customary law governed, would be family property commonly held. They earned revenue from state corporations that purchased and sold agricultural produce at international markets. They did not share that revenue with dependent family members who had rights to the land under customary law but not under statutory law. As with marriage went property, modern property law encouraged Africans to substitute the identity of family head with that of individual entrepreneur. They took out mortgages against title they had acquired in the new legal system. When banks sought to foreclose on unpaid loans, family members not listed in those deeds argued that they had cognizable legal interests in the property under customary law that prevented foreclosure.

Courts invented the African customary trust doctrine to resolve such cases in favor of customary claimants whether or not their names appeared on title deeds used to secure the loans.<sup>111</sup> In this way, courts modified modern property law's exclusive ownership provisions, in much the same way that marital property statutes have done in the West. But they did not stop there. The African customary trust doctrine served as a double-edged sword. It modified customary primogeniture rules. In succession matters, first-born male relatives would hold family property in trust for dependent family members even where such property had been registered to them only. Unmarried women and "illegitimate" children were particularly vulnerable and benefited from this judicial supplementation of customary law with English equitable trust doctrine.

Another instance of supplementation was the use of the English doctrine of presumption of marriage to find a marriage in cases of long cohabitation. If a couple had established a reputation within the community of being married and had showed an intent to be considered married, the courts presumed a marriage.<sup>112</sup> To the courts, a couple's expression of intent fulfilled the individualist aspirations of Cotran's modern family law schema while the reputation requirement paid homage to the role of the community in validating marriage. It fit Cotran's scheme perfectly. It is important to contextualize judicial invocation of this doctrine. Once heads of

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111. COTRAN, *supra* note 7.

112. Hortensiah Wanjiku Yawe v. Public Trustee, Court of Appeal for East Africa, Civil Appeal No. 13 of 1976; COTRAN, *supra* note 7, at 63.

households began to assert exclusive individual title to land, dependent family members were forced out of land and had to migrate to urban centers in search of employment. The hardship caused by migration delayed or prevented full compliance with the formal requirements of customary marriage law, especially requirements and rituals that required extensive community participation. For instance, relationships fell apart before dowry had been paid but after prolonged cohabitation. If courts refused to find a marriage for want of form, weaker parties who tended to be women, would miss the protections afforded by the law of divorce. Sometimes an individual married under customary law moved to an urban center and purported to marry another woman under religious or civil law. In a dispute between the "certificate" wife and the customary wife, say for a share of family property upon divorce or death of the man, arguing presumption of marriage was handy for the latter and her children.<sup>113</sup>

So long as a woman had surmounted challenges to her status as wife, whether by successfully establishing the elements of a valid marriage or by persuading a court to presume a marriage from long cohabitation and community reputation, the English Married Women's Property Rights Act, one among many received foreign statutes protected her marital property. This statute has been interpreted as overriding inconsistent customary laws.<sup>114</sup> Married women fighting heads of households for control of family property can marshal it instead of or together with the African customary trust doctrine. Customary laws did not provide uniform rules on what share of family property married women and women generally were entitled to.<sup>115</sup> This statute not only removed such disputes from the domain of customary law, and of "culture," it also made it possible for courts to expand married women's property rights.<sup>116</sup>

Notice that while the African customary trust doctrine protects women and other dependants against individualizing heads of households on a theory of common property, the Married Women's Property Rights Act protects them on the basis of individual rights to property acquired during marriage. This statute may override

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113. BANDA, *supra* note 7. Most countries have now decoupled marriage and succession to allow all children inheritance rights regardless of the marital status of their parents.

114. BANDA, *supra* note 7.

115. Uche U. Ewelukwa, *Post-Colonialism, Gender, Customary Injustice: Widows in African Societies*, 24 HUM. RTS. Q. 424 (2002); Rachel Rebouché, *Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women*, 19 HARV. HUM. RTS. J. 235 (2006). Obiora, *supra* note 51.

116. Recent Kenyan case.

certain customary law rules but in the end seems to complement customary law. Although it is a colonial statute received during an era of nonrecognition of customary marriage, its indiscriminate application validates customary marriages and puts them at par with civil marriages. It treats women married under various regimes equally. Its application serves to transcend the African/Western conceptual albatross in comparative family law.

Cotran's framework allows courts to intermingle customary and western marriage law rules. Customary law receives a reputational boost when courts invoke it to reform western law or when western law confirms that it is sensible, reasonable or rational by validating its provisions. Customary law returns the favor by offering a view of the family as a zone of economic activity that needs market-type distribution fairness rules to assure equitable gender and parental relations. Customary law can therefore contribute to the demarginalization of family law. In performing this function, it self-demarginalizes, and sets out to escape being a tool of the assertion of cultural hegemony.

### Conclusion

The diffusion of Anglo-American classical legal thought to Africa through colonial domination and other methods of influence established a hierarchical relationship of center and periphery with regard to forms and sources of legal authority, but legal thought progressed over time towards the social view of law, changing the terms of center/periphery correspondence and flow of legal influence. The global expansion of classical conceptual dichotomies reproduced in the periphery crises of governance and legitimacy legal professionals in the center were grappling with, and the emergence of common social problems made the divide between the west and the rest redundant, exposing conceptual dichotomization as a political tool rather than an accurate representation of the natural composition of western legal institutions. This in turn precipitated the quest for social and political transformation in both the center and the periphery.<sup>117</sup> Modern African marriage law is a product of this process of global introspection and diffusion of legal ideas.

Consequently, marriage law reform in Africa will continue to simultaneously weaken and affirm the customary form of marriage. Already, the trend is to affirm, simultaneously, individual rights and the right to culture in various laws and national constitutions.<sup>118</sup> As

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117. Kennedy, *supra* note 5, at 46-50.

118. Thanda Nhlapo, *The African Customary Law of Marriage and the Rights*

global economic integration intensifies, states and markets will continue to wrestle the customary family for control of resources and the place of customary marriage in the national legal system will continue to be questioned and adjusted. Marriage may very well be conceived as a conflict between state, family, and markets for governance and redistribution power; or it may be regarded as a zone for conflicts over private property rights, individual freedom, and human rights, that have nothing to do with the configuration of social institutions. If this turns out to be the case, pragmatic balancing of competing interests, another staple of Anglo-American legal thought, will be the next wave of legal diffusion in Africa. Its effect will be to impose on courts a doctrinal framework that adopts the technique of balancing individual rights against community interests and that prioritizes reasonableness analysis over categorical rules. Integrative legal pluralism is on the march but it is not clear what the future of marriage law in Africa will be.

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